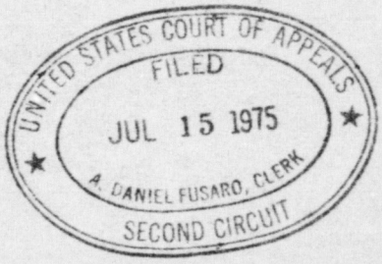
United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2079

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



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UNITED STATES OF AMERICA ex rel. JOSEPH EDWARD FRANCIS LUNZ,

Petitioner-Appellant,

-against-

J.E. LaVALLEE, Superintendent, Clinton Correctional Facility, Dannemora, New York,

Respondent-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

----------X

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (Neaher, J.) dated March 26, 1975 denying an application for a writ of habeas corpus. On April 14, 1975, the District Court issued a certificate of probable cause.

Questions Presented

1. Was appellant's guilty plea entered in violation of his constitutional rights?

2. Was appellant deprived of the right to effective assistance of counsel?

3. Is there a constitutional right to allocution?

Prior Proceedings

On August 23, 1965 at a term of the Supreme Court, Queens County (Shapiro, J.) appellant was sentenced to state prison for a term of twenty years to life after being convicted of the crime of murder in the second degree upon his plea of guilty. Judgment of conviction was affirmed 29 A D 2d 631 and leave to appeal to the New York Court of Appeals was denied. Application for coram nobis challenging the voluntariness of the plea was denied. Application for coram nobis challenging the competency of counsel was denied after an evidentiary hearing.

POINT I

THE PLEA WAS NOT ENTERED IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS.

Appellant claims that the plea was not voluntary and was based on a misunderstanding of the consequences. The claim is in conflict with the minutes of plea in which he acknowledged a realization that the penalty would be not less than twenty years and nevertheless expressed a desire to enter the plea (Appellant's Appendix, p. 6).

Appellant asserts that the plea was the product of a promise of immunity by the police. As stated when the plea was entered, appellant acknowledged a realization that the penalty would be not less than twenty years. As the District Court noted, appellant could not have had any doubt that he was going to prison (Appellant's Appendix, p. 6).

Appellant contends that the plea was the product of the urgings of counsel and emotional entreaties of family. Under the circumstances the allegation does not provide a basis for challenging the plea. As the District Court noted appellant and his co-conspirator had given confessions and his life was at stake. A plea of guilty motivated by a desire to avoid a possible death penalty is not invalid. Brady v. United States, 397 U.S. 742 (1970); Parker v. North Carolina, 397 U.S. 790 (1970); North Carolina v. Alford, 400 U.S. 25 (1970);

United States ex rel. Williams v. McMann, 436 F. 2d 103, 106 (2d Cir. 1970); Santana v. United States, 477 F. 2d 721, 722 (2d Cir. 1973); United States ex rel. Roldan v. Follette, 450 F. 2d 514, 515 (2d Cir. 1971).

Appellant contends that the plea was in part the product of an illegally obtained confession. Even an allegation that a coerced confession was the main reason for a plea (which is not alleged here) does not provide a ground for relief. United States ex rel. DeFlumer v. Mancusi, 443 F. 2d 940, 941 (2d Cir. 1971); United States ex rel. Davis v. Yeager, 453 F. 2d 1001, 1002, n. 1a (3rd Cir. 1971); Santana v. United States, 477 F. 2d 721, 722 (2d Cir. 1973); McMann v. Richardson, 397 U.S. 759 (1970). See also United States v. Antoine, 434 F. 2d 930 (2d Cir. 1970).

POINT II

APPELLANT WAS NOT DEPRIVED OF THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Appellant claims that he was denied the right to the effective assistance of counsel. The record indicates that he was represented by two well known and experienced lawyers. One had prosecuted a great number of important cases as an

Assistant District Attorney and had served as a County Court Judge for a period of time. The other had tried a number of important cases and bore an excellent reputation as a trial lawyer. As the state court noted in denying the coram nobis application after an evidentiary hearing on the issue of comtency of counsel, the lawyers had to balance the merits of an uncertain defense against the danger of capital punishment and under these circumstances a negotiated plea could not be deemed an abandonment of appellant's interests. See United States ex rel. Brown v. LaVallee, 424 F. 2d 457, 460 (2d Cir. 1970) (". . .The lawyers in good faith presented their experienced assessment of Brown's situation".); United States ex rel. DeFlumer v. Mancusi, 443 F. 2d 940, 941 (2d Cir. 1971).

POINT III

THERE IS NO CONSTITUTIONAL RIGHT TO ALLOCUTION.

Appellant contends that he was denied the right to speak in his own behalf at the time of sentencing. Appellant's attorney spoke on his behalf. A response by a defendant's attorney satisfied the requirements of Section 480 of the former Code of Criminal Procedure. People ex rel. LaFay v. McMann, 33 A D 2d 1102 (4th Dept. 1970); People v. White, 26 A D 2d 657

(2d Dept. 1966); People v. Woodruff, 32 Misc 2d 213, 214 (1961), affd. 20 A D 2d 970; People ex rel. Kaminsky v. Silberglitt, 30 Misc 2d 813 (1961), affd. 15 A D 2d 751. In any case, the issue is one of state law and does not present a constitutional question. Hill v. United States, 368 U.S. 424, 428 (1962)("It is an error which is neither jurisdictional nor constitutional"); United States ex rel. Murphy v. Denno, 234 F. Supp. 692, 695, n. 10 (S.D.N.Y. 1964).

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE AFFIRMED.

Dated: New York, New York
July 10, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellee

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

BURTON HERMAN
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

BERNADETTE MERLINO , being duly sworn, deposes and says that She is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellee herein. On the ~~14th~~ 15th day of July , 1975 , she served the annexed upon the following named person :

PAULA VAN METER, ESQ.
One Wall Street
New York, N.Y. 10005

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Bernadette Merlino

Sworn to before me this
~~14th~~ 15th day of July , 1975

Burton Herman
Assistant Attorney General
of the State of New York